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No. 91-362

In the Supreme Court of the United States

OCTOBER TERM, 1991

DIALAMERICA MARKETING, INC., PETITIONER

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in awarding back-pay for minimum wage violations to approximately 400 home workers performing the same job based on the representative testimony of 43 of the workers concerning their average production rates.

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OPINIONS BELOW

The order of the court of appeals summarily affirming the district court's judgment (Pet. App. A1) is unreported. The opinion of the district court (Pet. App. A3-A39) is reported at 716 F. Supp. 812.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1991. A petition for rehearing was denied on June 26, 1991. Pet. App. A2. The petition for a writ of certiorari was filed on August 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a corporation engaged in telephone marketing. Pet. App. A4. Between 1976 and 1982, petitioner employed "home researchers" to locate the telephone numbers of magazine subscribers whose subscriptions were about to expire. *Id.* at A4-A5. Researchers would travel to petitioner's office where they were given a box or boxes of cards listing the names and addresses of magazine subscribers. *Id.* at A5. The researchers attempted to locate each subscriber's telephone number, primarily through the use of directory assistance. *Id.* at A5, A28. The researchers were paid on a piecework basis: they received a flat rate for each telephone number located. *Id.* at A6. Petitioner did not require the researchers to work a maximum or minimum number of hours or to complete a specified number of cards (although researchers could not pick up a new group of cards until all cards in their possession had been processed), and "[e]ach home researcher tailored his or her home research to fit his or her individual needs and life styles." *Id.* at A5-A6.

Petitioner maintained records for each home researcher, listing for each week the number of cards the home researcher received, the number of cards for which the researcher found telephone numbers, the applicable piece rate, and the total amount petitioner paid the researcher. Pet. App. A6-A7. Petitioner kept no record of the number of hours worked by the researchers and did not require them to keep track of their hours. *Id.* at A7.

2. The Secretary of Labor brought this action alleging that petitioner's pay practices with respect to the home researchers violated the minimum wage and recordkeeping provisions of the Fair Labor Standards

Act (FLSA), 29 U.S.C. 201 *et seq.* Pet. App. A4. After a trial, the district court held that petitioner committed a "patently obvious" violation of FLSA recordkeeping requirements because it neither recorded the number of hours worked by the home researchers nor required the workers to do so. *Id.* at A23. See 29 U.S.C. 211(c); 29 C.F.R. 516.2. Petitioner has not challenged that ruling, either before this Court or in the court of appeals.[1]

As to the allegations of minimum wage violations, the inquiry at trial focused on determining the home researchers' production rate—that is, the number of cards reviewed or completed per hour. The employer's records revealed the total number of cards reviewed weekly by each employee, and the total amount paid to each, but not the hourly wage. Determination

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[1] This suit originally encompassed two groups of workers, home researchers and "distributors." Distributors distributed cards to certain home researchers ("distributees") who could not or would not travel to petitioner's office. Petitioner paid the distributors one cent above the piece rate and issued one check for the gross amount of all telephone numbers located by their distributees. See Pet. App. A6; *Donovan* v. *Dial-America Marketing, Inc.* (*DialAmerica I*), 757 F.2d 1376, 1386 & n.13 (3d Cir.), cert. denied, 474 U.S. 919 (1985). Initially, the district court ruled that both home researchers and distributors were independent contractors and not employees covered by the FLSA, and dismissed this action in its entirety. On the Secretary's appeal, the court of appeals agreed with the district court that the distributors were independent contractors, but held that the home researchers were employees. *DialAmerica I*, 757 F.2d at 1379. This Court denied certiorari on the latter question. 474 U.S. 919. On remand from the court of appeals, the district court then determined that petitioner had not complied with the minimum wage requirements of the FLSA for the home researchers, and the court of appeals affirmed.

of the production rate, as applied to the total number of cards processed, would permit an estimate of the total number of hours worked by the researchers, from which it was possible to calculate the hourly wage the workers were actually paid. Pet. App. A10-A14.

In an effort to estimate the workers' rate of production, the district court heard the testimony of 43 former home researchers. Twenty-four appeared as trial witnesses and the depositions of 19 others were entered into evidence. Pet. App. A8. The home researchers testified as to the nature of their work and the number of hours it took them to complete a given number of cards. *Id.* at A8-A9. In addition, an expert witness testified as to the time needed to process the cards and procure telephone numbers by various methods, *id.* at A20-A23, and a Department of Labor compliance officer suggested formulas that would aid the court in determining the workers' production rates. *Id.* at A10-A17, A29-A30.

The court began its analysis of the evidence by noting that the burden is on the plaintiff to establish that an employee has performed work for which he was not properly compensated. Pet. App. A24. The court explained, however, that under *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), if an employer fails to maintain records mandated by the FLSA, an employee "meets the required burden if he or she can prove that work was performed for which the worker was not properly compensated and if he or she produces sufficient evidence to show the 'amount and extent of that work as a matter of just and reasonable inference.'" Pet. App. A24-A25 (emphasis omitted), quoting *Mt. Clemens*, 328 U.S. at 687. The burden then shifts to

the employer to "produce evidence of work performed or to negate the reasonableness of the inference to be drawn from the employee's evidence." Pet. App. A25.

The court further observed that, under *Mt. Clemens*, once an employee has proved the existence of minimum wage violations, the uncertainty created by the absence of records should not bar a reasonable assessment of damages. The court observed that courts have a great deal of discretion in estimating the "approximate" amount to be awarded, see *Mt. Clemens*, 328 U.S. at 688, and can determine damages "as a matter of 'just and reasonable inference' " without hearing testimony from all employees. Pet. App. A26.

Applying these principles, the district court held that the Secretary had established a pattern of "pronounced" minimum wage violations for all home researchers, including those who had not testified at trial or by deposition. Pet. App. A4. The court found it reasonable to conclude that the work patterns established through the testimony of the 43 workers were fairly representative of the approximately 350 non-testifying researchers. The court observed that, although the home researchers worked at different times of the day and without supervision, "their basic research task was straightforward and uniform." *Id.* at A28. The court further noted that "[t]he sheer commonality of their testimony breathes credibility into the claims of the testifying home researchers, and permits this Court to feel comfortable in drawing inferences therefrom." *Id.* at A29. Relying on the patterns established by the testimony, the court found that "[t]he average rate for all employees was 53 cards/hour, a number derived by averaging the midpoint rates [itself an average of the low and high

numbers testified to] for all testifying witnesses." *Ibid.* Applying this production rate, it was possible to estimate the hours worked by each employee to complete the total number of cards processed, *id.* at A29-A30, and to calculate the pay each received for each estimated hour of work. Because the estimated hourly rate paid to each worker fell below the minimum wage, the court concluded that petitioner violated the minimum wage law "for *every* home researcher." *Id.* at A29; see also *id.* at A5 n.5, A13.[2]

The court held that DialAmerica's evidence failed to rebut the Secretary's showing of violations. Pet. App. A19, A3-A31. The company submitted a telephone test that it had administered to deponent home researchers, which purportedly showed that the production (cards/hour) rate was much higher than that alleged by the Secretary. *Id.* at A18. The court deemed the test "unconvincing," *id.* at A30, based on testimony by the home researchers that the test did not reproduce the conditions under which they actu-

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[2] In addition, the court found (Pet. App. A29-A30) that the Department of Labor compliance officer's testimony, which was largely based on petitioner's own records, constituted "substantial other evidence" supporting its determination that the testimony of the 43 home researchers established a pattern of minimum wage violations for the entire group of home researchers. The compliance officer testified that "[a]t a production rate of 60 cards per hour * * * 91% of the 4,922 person-work weeks in 1982 would have resulted in minimum wage violations." *Id.* at A18. At a production rate of 50 cards per hour, "*every* employee was subjected to a minimum wage violation" during that period. *Ibid.* (emphasis in original). Even at a rate of 90 cards per hour—a rate much higher than the estimated production average of 53 cards per hour, and one that was achieved by only three researchers—"53% of the person-work weeks resulted in minimum wage violations." *Ibid.*

ally worked. The court also found that petitioner's evidence was outweighed by the "pattern established by the testimony of so many home researchers and the records submitted in evidence." *Id.* at A19, A30-A31. In sum, the court concluded that the Secretary had demonstrated "an unrebutted pattern of minimum wage violations by DialAmerica" as to its home researchers. *Id.* at A28.

Finally, the court concluded that the "assignment of the 53 cards/hour average to each employee will yield the most equitable result in determining the amount of back wages to be awarded to both testifying and non-testifying home researchers." Pet. App. A30. The court therefore ordered the payment of back wages based on the 53 cards/hour production rate, and directed the parties to apply to a magistrate for implementation of the decision. *Id.* at A31-A33.

The magistrate recommended that the district court accept the Secretary's calculations of back wages due in the amount of $154,413.73, with prejudgment interest.[3] The district court entered a final judgment adopting the magistrate's recommendations. Pet. App. A41-A42. The court of appeals affirmed without opinion. *Id.* at A1.

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[3] This aggregate amount was obtained by adding together the amount of backpay due each home researcher, which was calculated by multiplying the difference between the minimum wage rate and the sub-minimum wage that each worker was estimated to have received, see pp. 5-6, *supra*, times the estimated number of hours worked (based on the 53 cards/hour production rate and the number of cards the worker processed). See Pet. App. A10-A14; A32, A34-A36.

ARGUMENT

Contrary to petitioner's assertion (Pet. 6), the court of appeals' ruling is not in conflict with the decision of this or any other court, and is correct as a matter of fact and law. Further review is unwarranted.

1. The decision does not contravene this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946); rather, it is fully consistent with it. In *Mt. Clemens*, the Court held that an employee claiming a minimum wage violation need not "prove the precise extent of uncompensated work" where his inability to do so is the result of an employer's failure to maintain records required by the FLSA. Rather, the employee "has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated" and then produces "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687.

Under cases applying *Mt. Clemens*, the district court was correct to rely on representative testimony, in the absence of adequate recordkeeping, to determine the pattern and degree of wage violations. "Courts have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees * * *. The requirement is only that the testimony be fairly representational." *Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985); see also *Donovan* v. *New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982) ("it is clear that each employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of 'just and reasonable inference'"); ac-

cord, *McLaughlin* v. *Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989); *Donovan* v. *Simmons Petroleum Corp.*, 725 F.2d 83, 86 (10th Cir. 1983); *Brennan* v. *General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973).[4] The use of representative testimony is fully in keeping with the *Mt. Clemens* decision: As the Court pointed out, barring recovery in the absence of precise proof of the exact amount of undercompensation would "place a premium on an employer's failure to keep proper records" and "penalize the employee" by allowing the employer "to keep the benefits of an employee's labors." 328 U.S. at 687.

Petitioner acknowledges (Pet. 7-10) that representative testimony is sometimes appropriate to establish a minimum wage violation, but contends (Pet. 6) that, as a matter of law, a district court should not accept such testimony with respect to work performed at home. There is no basis in the case law

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[4] In *Secretary of Labor* v. *DeSisto*, 929 F.2d 789 (1st Cir. 1991), the court of appeals held that the testimony of one employee was insufficient to establish a pattern of wage violations, even under *Mt. Clemens*' "minimal burden" standard, for 244 employees holding a variety of positions at different locations. Recognizing that representative testimony was a well-accepted method of establishing wage violations in the absence of employer records, the court noted that "[u]sually, an employee can only represent other employees only if all perform substantially similar work." 929 F.2d at 793. In remanding that case for a new trial, the court of appeals distinguished the district court's decision in this case, noting that both testifying and nontestifying employees in this case performed the same job of home researcher, *ibid.*, and that the higher ratio of testifying to nontestifying employees in this case stood in "stark" contrast to the low ratio there. 929 F.2d at 793 n.2.

or in logic for this assertion.[5] Employers are required to maintain records showing the number of hours worked by homeworkers covered by the Act, 29 C.F.R. 516.2, 516.31, and their failure to do so creates the same difficulties of proof for homeworkers as it does for other classes of employees. Cf. *Marshall* v. *Van Matre*, 634 F.2d 1115, 1118-1119 (8th Cir. 1980) (applying *Mt. Clemens* paradigm to homeworker operation where employer failed to maintain records of hours worked). A rule prohibiting representative testimony in this context would contravene the teaching of *Mt. Clemens* that workers should not be penalized for their employers' failure to maintain adequate records by being held to an unduly stringent standard

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[5] Petitioner contends that representative testimony can be used to establish wage violations for a larger group only where (1) employees work together in regular shifts with supervision; (2) the employer has engaged in systematic falsification or fraud; or (3) there is "substantial other evidence" supporting the representative testimony, such as employer admissions or testimony from government investigators based on employee interviews or surveys. Pet. 7-10.

There is no support in the cases for this rigid tripartite formulation, and no court has adopted it. Cf. *Bel-Loc Diner*, 780 F.2d at 1116 (rejecting contention that Secretary was obliged to present testimony pertaining to each shift and stating that the "requirement is only that the testimony be fairly representational"); see also *Simmons Petroleum Corp.*, 725 F.2d at 86 n.3 ("Employer asserts that the rule that the use of representative testimony can establish a pattern of violations is limited to situations where the employees leave a central location together at the beginning of a work day, work together during the day, and report back to the central location at the end of the day. This rule is not supported by case-law."). In any event, the instant case satisfies petitioner's restrictions since the district court found that the testimony of the Department of Labor compliance officer constituted "substantial other" evidence of minimum wage violations.

of proof. 328 U.S. at 687-688. Under petitioner's theory, the Secretary could establish her case only by presenting the testimony of all 400 homeworkers as to their precise individual rates of production. Such a requirement places an onerous burden on both the Secretary and the district court and would, in many cases, obviate recovery. See *Dole* v. *Solid Waste Servs., Inc.*, 733 F. Supp. 895, 926 (E.D. Pa. 1989) (noting that refusal to allow representative testimony in a complex case would lead to a "mammoth" trial), aff'd, 897 F.2d 521 (3d Cir.) (unpublished opinions), cert. denied, 110 S. Ct. 3271 (1990); *Donovan* v. *Burger King Corp.*, 672 F.2d 221, 225 (1st Cir. 1982) (representative testimony avoids burdening the district court). Nothing in *Mt. Clemens* mandates this result.

2. Petitioner also challenges (Pet. 2-3, 14-16) the district court's use of an average production rate as a basis for its finding that the home researchers had "in fact performed work for which [they] were improperly compensated" and for the calculation of the amount of backpay due. Petitioner contends that it is not reasonable to calculate the total amount of backpay from an estimate of the researchers' average per hour production rate because the wide variation in work patterns casts doubt on the conclusion that the production rates of the testifying group reflect those of the workers as a whole. See Pet. App. A10.

In effect, petitioner challenges the district court's factual findings that the range of work rates established by the testifying researchers mirrors the larger group—that is, that the testifying group is "representative." In complaining of the Secretary's failure to demonstrate the statistical validity (Pet.

11) of this finding, however, petitioner misconstrues the burden of proof allocated in *Mt. Clemens*. Once the employee provides evidence of the "amount and extent" of a violation "as a matter of just and reasonable inference," the burden shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." 328 U.S. at 687-688. Absent such evidence, the court may award damages "though the result be only approximate." *Id.* at 688.

Although petitioner had the opportunity to do so, it did not succeed in proving with precision the amount of work performed; petitioner's evidence, which consisted of tests it conducted indicating a higher average production rate, was rejected by the district court as inherently flawed and contrary to the testimony of the researchers themselves. Nor did petitioner demonstrate that the court's method for calculating backpay was unreasonable. The court's conclusion that the average work rate of the testifying group was "fairly representative" was plausible in light of the size of the representative group, and the uniformity of the task performed by all the researchers. Cf. *Secretary of Labor* v. *DeSisto*, 929 F.2d 789 (1st Cir. 1991) (testimony of one researcher inadequate to establish work habits of 244 workers performing many different jobs). It was up to petitioner to demonstrate, by statistical methods or otherwise, that the average production rate of the testifying researchers was not, or could not be, representative of all the workers. This petitioner failed to do.

In arguing that the approach adopted by the court is "inequitable" or disadvantageous to the employer,

petitioner focuses on the use of the 53 card per hour average rate used to calculate the amount of wages due the testifying employees, many of whom reported a higher or lower average rate of work. Pet. 14-15; see Pet. App. A43-A44. As petitioner recognizes, however (Pet. 2, 14-15), while the use of an overall average rate may overcompensate some employees, it *undercompensates* others. Because the testimony of a large number of employees was taken into account, and the employees' testimony was found to be representative, there is every reason to believe that such inaccuracies will balance out; and there is no reason to believe that petitioner's overall monetary liability is any greater than it would have been had the court heard testimony from more researchers, or attempted more precisely to calculate the back wages due the researchers who did testify.

In any event, it was clearly permissible under *Mt. Clemens*, 328 U.S. at 688, to use an average rate even though it might provide only an "approximate" measure of damages. As the district court explained (Pet. App. A30), whatever imprecision results from the use of representative testimony is directly attributable to petitioner's failure to maintain appropriate records. "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements * * * of the Act." *Mt. Clemens*, 328 U.S. at 688; see *Brock* v. *Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) ("*Mt. Clemens Pottery* leaves no doubt that an award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records as required by the FLSA."); *Beliz* v. *W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1330-

1331 (5th Cir. 1985) ("Because precise evidence of the hours worked by each individual is not available due to the failure of [the employer] to keep adequate records, the workers may satisfy their burden with admittedly inexact or approximate evidence.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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